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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 602

CONNER AIR LINES, INC., F. A. CONNER, M. M. LANDY
and
AMERICAN CASUALTY COMPANY OF READING,
PENNSYLVANIA, *Petitioners*,
vs.
AVIATION CREDIT CORPORATION, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The pertinent and material facts of this case are set forth with exactitude in the Opinion of the Court of Appeals reported in 307 F. 2d 685. (Petition, App. 1-8)

In thumbnail summary, respondent financed the rehabilitation of an airplane owned by petitioner and took what was held to be a mortgage as security. This mortgage was foreclosed and a receiver appointed to lease the aircraft pendente lite. An original foreclosure decree for approximately $417,000 (dated June

17, 1959) was reversed and upon remand increased to approximately $558,000.

As an incident to that appeal petitioner posted a supersedeas bond of $175,000.

After the enlarged decree was entered the airplane was sold for only $55,000. Rentals received pendente lite amounted to approximately $394,000.

The District Court applied the aggregate of the two funds ($449,000) against the original reversed decree and charged the supersedeas bond with only $13,068.14. In the decision here sought to be reviewed, the Court Appeals said:

> "We agree with appellant's alternative contention that the rentals earned pendente lite and the sale proceeds should have been applied pro rata to the payment of the amount ascertained in the decree of June 17, 1959, and to the portion of the mortgage debt represented by the increase in the decree after remand. Such application appears to us to give recognition to the intention of the parties both in the mortgage contract and in the supersedeas bond, to be just and equitable, and to be in accord with the pertinent authorities. See 40 Am. Jur., Payment, Secs. 145, 149, 150; 70 C.J.S., Payment, Secs. 69, 73; Annotation, 57 A.L.R. 2d, pp. 865 et seq."

Petitioners' statement of the case and of their suggested Question are confusing because of inaccuracies and the inclusion of matters not contained in the record which was before the Court of Appeals on this particular appeal.

For example, the seven paragraphs following the first paragraph in petitioners' statement of the case (all without record references) are copied verbatim from the petition for a writ of certiorari in Case No.

452, October Term 1960, which sought to review a prior decision reported as *Conner Air Lines, Inc.* v. *Aviation Credit Corporation* (5 Cir. 1960) 280 F. 2d 452, October Term 1960, which sought to review the 895, wherein, upon Respondent's appeal, the circuit court reversed the district court and increased the amount of original foreclosure decree from approximately $417,000 to approximately $558,000. That petition was denied by the Supreme Court on December 5, 1960. The former appeal has no relevancy to the decision now attacked by petitioners.

Again, in their statement of the case and in the question they suggest, it is implied that the receiver appointed by the Court to collect the rents and profits of the mortgaged aircraft was appointed as the result of an "asserted tax lien later found to be invalid." This inaccuracy is evidenced by the original final decree filed June 17, 1959, in the third paragraph of which it was found that the United States of America had valid tax liens in the sum of $7,503.63. (R 9)

Another inaccuracy is petitioners' statement that in the Court of Appeals respondent maintained that the liability on the petitioners' supersedeas bond, filed in connection with its appeal from the original decree of June 17, 1959 in the sum of $417,646.10, could be extended to cover the $558,144.70 judgment after remand. In the second footnote to its Opinion (307 F. 2d 685, 687) the Court of Appeals said:

> "To quote from appellant's reply brief:
>
> "'(Appellees) argue and cite authorities to the effect that a supersedeas bond conditioned to pay a judgment cannot be extended to cover an enlarged judgment resulting from a cross-appeal. Although appellant would like to make this argu-

ment and believes that it should be the law, nevertheless appellant has not made this an issue in its appeal nor argued same in its brief . . .

" 'As previously stated, appellant does not contend in this appeal that the surety's liability should be extended to cover the increase in the judgment after remand.' "[1]

In view of the inclusion by the petitioners of extraneous matters, factual inaccuracies and wholly irrelevant material, the respondent respectfully submits that the question attempted to be presented is misleading and is inadequate as a predicate for the review they seek.

REASON WHY WRIT SHOULD NOT BE GRANTED

The decision of the Court of Appeals is not in conflict with Florida law, as asserted by petitioners, but on the contrary follows the law implicitly.

ARGUMENT

As stated by the Court of Appeals, respondent's main point for reversal of the District Court was that the mortgage security should have been applied first to the payment of the portion of the debt represented by the increase in the decree after remand (which was not covered by the supersedeas bond) with the balance applied to that portion of the debt represented by the original reversed decree; or, in the alternative, that the mortgage security should have been applied pro rata.

[1] This eliminates, as wholly irrelevant, all of the argument and all of the cases on this subject which are cited at pages 12 and 13 of the petition.

The District Court had done neither. It had ignored the well-established principles of law and equity with respect to application of payments by applying 100% of the proceeds derived from the mortgage security to the original decree in order to exonerate the surety from liability. (R 39) This left the parties to the $175,000 supersedeas bond liable for only $13,068.14; whereas a pro rata application of the payments would have made the petitioners liable on their bond for $96,411.87. (R 40-41)

The real question before the Court of Appeals was the proper application of the mortgage security to the respondent's debt and it cannot be denied that this mortgage security applied to the entire indebtedness and not to only a part thereof. Actually, the original judgment of $417,646.16, which was determined on the prior appeal to be erroneous, was supplanted by the judgment after mandate of $558,144.70. Nevertheless, at the insistence of petitioners, for the purposes of determining liability on the supersedeas bond, the District Court erroneously applied all of the mortgage security to the reversed judgment and nothing to the true indebtedness. This, despite the fact that the receiver, pursuant to Court order, had theretofore paid $250,000 which had already been credited to the increased judgment of $558,144.70. (R 22)

In reversing the District Court, the Court of Appeals followed the well-established rule in Florida and elsewhere that payments made from funds realized in invitum, that is to say, coerced by operation of law, are not voluntary payments. Since neither the debtor nor the creditor had the right to direct the application of an involuntary payment, that duty devolved upon the Court which should have made application of

the mortgage security in an equitable manner, fair to all parties. 24 Fla. Jur. 536, Payment, § 16; 542-543, Payment, §§ 24 and 25.

Petitioners contended below, as they do in this Court, that the proceeds realized by the receiver from renting the mortgaged aircraft pendente lite belonged to the mortgagor and were subject to its direction as to application. They cite quotations from Florida Jurisprudence concerning the general law of mortgages to the effect that where there is no pledge by the mortgagor of rents and profits to secure the mortgage debt, the control of rents and profits remains in the mortgagor subject to his appropriation and direction. The leading case in Florida applicable to the facts here is *Pasco* v. *Gamble*, 15 Fla. 562, where the Supreme Court of Florida said:

> "The right to appropriate the rents and profits which equity gives the mortgagee, where a receiver is appointed at his instance, does not result from any specific pledge of such rents contained in the mortgage. Equity makes the mortgage, as between mortgagor and mortgagee, a charge upon the rents and profits whenever the mortgagor is insolvent and the security is inadequate * * * 'although in equity the mortgagor remains the actual owner of the land until foreclosure, entitling him while in possession to the receipt of the rents and profits without account, *yet equity, regarding the land with all its produce as a security for the mortgage debt, will restrict the right of ownership within those bounds which may not operate to the detriment or injury of the mortgagee.*' * * *
>
> "After the appointment of a receiver, the rents and profits coming to his hands * * * *are to be distributed according to the rights and priorities*

of the parties 'in or to the principal subject, out of which these rents and profits issue.'" (Emphasis supplied)

Whatever the general rights of a mortgagor may be in the absence of a receivership, the fact remains, as recited by the Court of Appeals, that the District Court had appointed a receiver to lease the mortgaged aircraft, collect the rents, and to hold them subject to the order of the Court. The propriety of the receiver's appointment was never questioned, was agreed to by all parties, and was not an issue in the Court of Appeals.

Petitioners cite no Florida cases in conflict with the pertinent authorities referred to by the Court of Appeals in support of its decision that a pro rata application of the mortgage security should have been made by the lower court.[2]

CONCLUSION

Neither the facts nor the law support the vague, uncertain and confused contentions of petitioners. The decision of the United States Court of Appeals for the Fifth Circuit was not in conflict with the law applicable in Florida or elsewhere, and it is respectfully submitted that the petition for writ of certiorari should be denied.

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By .....

[2] The citations on page 11 of the petition for certiorari deal with the right of appeal from a judgment or decree by a party who has accepted benefits thereunder. No such issue was involved in the Court of Appeals.

Certificate of Service

I, Robert V. Smith, one of the attorneys for the Respondent, Aviation Credit Corporation, in the above-styled cause, do hereby certify that copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari have this day been mailed to Don G. Nicholson, 221 Security Trust Building, Miami 32, Florida, Attorney for Petitioners, Conner Air Lines, Inc., F. A. Conner, M. M. Landy and American Casualty Company of Reading, Pennsylvania.

Dated this 14 day of December, 1962.

Robert V. Smith